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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

CITY AND COUNTY OF SAN FRANCISCO, et al.,

Petitioners,

v.

VICTOR CARPENTER, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether review is appropriate when the Court of Appeals ruled, exclusively on state grounds, that San Francisco's ownership, maintenance, and permanent display of a massive cross in a public park violate the California Constitution.

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STATEMENT OF THE CASE

The largest cross in the United States stands alone on the peak of Mt. Davidson, the highest elevation in San Francisco. The City built the Cross with public funds in 1934, and has supported and maintained the Cross on public park land ever since. Plaintiffs and respondents in this case, religious leaders and citizens of majority and minority faiths ("plaintiffs"), filed suit claiming that the City's ownership, maintenance and display of the Mt. Davidson Cross violated the Religion Clauses of the state and federal Constitutions. The Ninth Circuit Court of Appeals ruled that the California Constitution bars the City from maintaining an enormous cross in a public park. Defendants, the City and County of San Francisco, the Recreation and Park Commission, and its General Manager ("the City"), seek a writ of certiorari to review that state constitutional decision.

I. Factual Background

The Mt. Davidson Cross is a plain, unadorned, concrete and steel Latin cross, measuring 103 feet in height and 40 feet in width. ER 32, 65, 167, 282.[1] The City permanently displays the Cross in a public park at the top of Mt. Davidson, which, at 938 feet, is the highest of

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[1] Petitioners' Appendix is designated "App." The Petition for Writ of Certiorari is designated "Pet." The Excerpts of Record submitted to the Court of Appeals are designated "ER." The Clerk's Transcript of the district court proceedings is designated "CT." Plaintiffs' request for judicial notice, granted by the Court of Appeals, is designated "RN."

the City's seven hills. ER 163, 165, 320. No other monument stands in the park. The Cross is inscribed: "Sunrise Easter Cross – Mount Davidson – First Service 1923." RN.

The Mt. Davidson Cross is a massive structure, described repeatedly as "awesome" (ER 134), "towering" (ER 134), "colossal" (ER 107-108), and "overwhelming" (ER 106). Displayed in solitude, the Cross is the focal point of the park. No tree obscures the Cross, which is encircled by a base 65 feet in diameter. CT 30. It dwarfs visitors to the park. *See, e.g.*, ER 24-25. The Cross is also a commanding presence from a distance. In the words of the City's expert witness, the Cross "is a prominent feature of the western San Francisco landscape" (ER 52) which "can be seen from most of San Francisco . . . and illuminated it has been seen as far as 50 miles out at sea." ER 65. *See also* ER 26, 74, 161, 320, 105-110, 132, 134, 144, 151, 159, 282, CT 50 at 1.

The Cross serves as the site of Christian religious observances, such as Easter sunrise services, Christmas celebrations, and weddings. ER 36. People of minority faiths have never held religious celebrations on Mt. Davidson. ER 216-217. Easter sunrise services have been held every year at the base of a cross on Mt. Davidson since 1923, when the first cross was erected in order to be ready for the Easter sunrise service. ER 245-247. The 1923 cross was the first of four wooden crosses which were successively destroyed by fire, wind, or vandals. ER 53, 55-56. The current Cross was erected as a permanent replacement at the urging of a citizen, James Decatur. ER 56. Decatur, a devout Christian, wished to create a huge cross on San Francisco's tallest peak so that "every one of the two million people who move about in our Bay region

can plainly see it, on the summit of Mt. Davidson, the highest point in San Francisco." ER 272-273.[2] The proposed cross was designed to communicate the "glory of God" to "millions of people" each day, and to create a site for sunrise Easter services. ER 58, 253. He organized the Easter Sunrise Committee, which lobbied the City to erect the large, permanent cross. ER 58.

The Committee's mission succeeded. San Francisco city officials agreed to build a permanent "Easter Cross" and to appropriate public funds for its erection upon approval by the City Attorney. ER 89-91. The City Attorney advised the officials that building the Cross was permissible, but that the city charter required the municipal art commission to approve the "erection or location of any monument in any public place in the City (except in any museum or art gallery)," and, for that reason, the Art Commission would need to approve the design and placement of the Easter Cross. *Id.*

The City hired an architect to design the Easter Cross. A month later, the city's Art Commission approved his structural and engineering plans for the proposed cross. ER 97-98. The City authorized the expenditure of public funds to design, construct, and maintain the permanent concrete and steel cross (ER 111-122) and authorized installation of floodlights to illuminate the cross during the Christmas and Easter seasons. ER

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[2] Decatur wrote:

Why build a high Cross on the top of a hill?
So that each hurrying traveler might see
The standard by which all must measure their lives.
The symbol from which none should flee. ER 291.

115-116. The City spent $25,000 in public funds for "the World's Largest Cross, built during the depression." ER 132, 134.

The City conducted three official ceremonies for the municipal Cross. At the first ceremony, on Easter 1932, the Governor dedicated the cornerstone for the new cross, city officials and Easter Sunrise Committee members spoke, and clergy conducted an Easter sunrise service. ER 62-63. At the second, in 1934, a copper box was laid in a crypt at the base of the City's new concrete and steel cross. ER 65-66. In addition to newspapers and telephone directories, the box contains two Bibles, eleven Easter Sunrise service programs containing prayers and hymns, two rocks from the Garden of Gethsemane, and a jug of water from the River Jordan. ER 65-66, 247. The water and stones are, in the words of the Easter Sunrise Committee, "mementos and sacred relics from the Holy Land." ER 148.[3] The crypt was sealed with concrete mixed with water from the River Jordan. ER 65-66, 247.

At the final dedication ceremony, on Saturday, March 25, 1934, "the eve of Palm Sunday" (ER 324), the City inaugurated the illumination of the Cross for Easter week. The Easter Sunrise Committee planned the program, which included addresses by city officials and local pastors. At 7:30 p.m., President Franklin Roosevelt pressed a golden telegraph key sending a signal from Washington, D.C. to illuminate the Cross for Easter week.

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[3] According to Christian scripture, Jesus went with his disciples before the crucifixion to the Garden of Gethsemane (Matthew 26:36; Mark 14:32), and John the Baptist baptized Jesus in the River Jordan (Matthew 3:6-17; Mark 1:9).

Pastors from local churches offered prayers and hymns. ER 132, 230-231.

From 1934 to 1954, the City illuminated the Cross at public expense during Easter Week (ER 66-67) and occasionally at Christmas. ER 176. From 1954 to 1976, the City lighted its Cross nightly, partly with tax funds and partly with funds donated by a local church. ER 66-67, 161, 170, 172. The City ceased nightly illumination in 1976 because of vandalism and an energy crisis (ER 67, 172) but continued to light its Cross during Christmas and Easter at public expense until 1990. In anticipation of this litigation, the City's Recreation and Park Commission issued a formal resolution halting illumination of the City's Cross. ER 180.

II. Proceedings Below.

On cross motions for summary judgment, the district court denied plaintiffs' motion and granted the City's motion. ER 372-379. The judge ruled from the bench, observing: "I find it distressing that I am part of a legal system that appears to say that it is not a violation of the Constitution to burn the American flag, but it would be a violation of that same Constitution to have a cross or arguably a crescent or star of David on public land." ER 372. The court directed the City to "prepare the order." ER 378-379. Several months later, the City submitted a 30-page draft opinion with extensive factual findings on the asserted unique qualities of the Mt. Davidson Cross. ER 381-410. Over plaintiffs' objection, ER 411-415, the district court adopted, wholesale and verbatim, much of the City's draft opinion. App. 15-49.

The Court of Appeals reversed on state constitutional grounds alone. App. 1-14. The court followed *Ellis v. City of La Mesa*, 990 F.2d 1518 (9th Cir. 1993), *cert. denied, San Diego County v. Murphy*, 114 S. Ct. 2707 (1994), *cert. denied, City of San Diego v. Paulson*, 115 S. Ct. 311 (1994), which held that San Diego violated Article I, Section 4 of the California Constitution by maintaining large crosses in hilltop public parks. Reviewing the record in light of the factors articulated in *Ellis* for evaluating the validity of religious displays, the court concluded that, for "California constitutional purposes, the Cross is virtually indistinguishable from the Mount Helix and Mount Soledad Crosses previously invalidated by this court." App. 13. The court denied the City's petition for rehearing and rejected its suggestion for rehearing en banc. App. 61-62.

SUMMARY OF ARGUMENT

The petition for certiorari reargues a state constitutional law claim which the City lost below. The City does not identify an important (or indeed any) federal question meriting this Court's discretionary review. This Court's rare exercise of jurisdiction over state law claims is reserved for cases of "plain error" by a federal appeals court. In this case, the Court of Appeals decision, holding that the California Constitution's strict provision requiring separation of church and state bars the government from using a public park to display an enormous cross, is plainly reasonable. In fact, it is correct.

REASONS FOR DENYING THE PETITION

I. This Court's Review of State Law is Reserved for Extraordinary Cases of Clear Error

The City is a disappointed litigant which seeks an opportunity to reargue its state law question in this Court. "[S]tanding alone, a challenge to state-law determinations by the Court of Appeals will rarely constitute an appropriate subject of this Court's review." *Haring v. Prosise*, 462 U.S. 306, 314 n. 8 (1983); Sup. Ct. R. 10. This Court will not disturb the decisions of lower federal courts on issues of state law unless they are "clearly wrong," *The Tungus v. Skovgaard*, 358 U.S. 588, 596 (1959); "unreasonable," *Propper v. Clark*, 337 U.S. 472, 486-87 (1948); "clearly erroneous," *United States v. Durham Lumber Constitution*, 363 U.S. 522, 527 (1960); or there exists a "plain showing of error." *Palmer v. Hoffman*, 318 U.S. 109, 118 (1942). This case fails to approach this standard.

II. The Court of Appeals Correctly Applied Established California Constitutional Law

The City's display of the Mt. Davidson Cross represents the paradigm of forbidden government involvement with religion through symbolic authority. The City built the Cross with public funds to serve as a pilgrimage site for Easter services, and, during sectarian dedication ceremonies, literally embedded symbols of Christianity within its base, in its crypt sealed in concrete mixed with holy water. At public expense, the City conducted ritualistic illumination of its Cross to celebrate significant Christian holidays, when it was not lighting its Cross

nightly to mark the San Francisco skyline. The City today displays its Cross, designated the "Sunrise Easter Cross," in solitude, every day of the year. The Cross dominates a public park.

It is hardly surprising that the Court of Appeals concluded that the City's Cross is inconsistent with the constitutional principle of separation of church and state. No federal case has permitted the government to maintain a permanent cross in a public park,[4] and the Seventh Circuit sharply criticized the lower court decision in this case as a constitutional aberration. *Gonzales v. North Township of Lake County Ind.*, 4 F.3d 1412, 1421-1422 (7th Cir. 1993). The California Constitution's No Preference Clause, which is *stricter* than the Establishment Clause, clearly prohibits the government from maintaining this massive sectarian display in a public park.

Article I, Section 4 of the California Constitution guarantees that religion shall be practiced "without discrimination or preference." The California Supreme Court has ruled that this clause, part of the state's original 1849 Constitution, is broader than the federal First Amendment. *Fox v. City of Los Angeles*, 22 Cal. 3d 792, 796, 587 P. 2d 663, 665 (1978); *Feminist Women's Health Center v. Philobosian*, 157 Cal. App. 3d 1076, 1092, 203 Cal. Rptr. 918, 926 (1984), *cert. denied*, 470 U.S. 1052 (1985). Indeed, it

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[4] *See, e.g., Gonzales v. North Township of Lake County, Ind.*, 4 F.3d 1412 (7th Cir. 1993); *American Civil Liberties Union of Ga. v. Rabun County Chamber of Commerce*, 698 F.2d 1098 (11th Cir. 1983); *American Civil Liberties Union v. Eckels*, 589 F. Supp. 222 (S.D. Tex. 1984), *appeal dismissed*, 755 F.2d 426 (5th Cir. 1985), *cert. denied*, 474 U.S. 980 (1985).

"would be difficult to imagine a more sweeping statement of the principle of governmental impartiality in the field of religion" than California's No Preference Clause. *Sands v. Morongo Unified School District*, 53 Cal. 3d 863, 809 P. 2d 809, 820 (1991), *cert. denied*, 505 U.S. 1218 (1992) (plurality opinion) (quoting 25 Ops. Cal. Atty. Gen. 316, 319 (1955)).

California courts have recognized that the Latin cross conveys a religious Christian message with unique power. The cross "is the preeminent symbol of many Christian religions and represents with relative clarity and simplicity the Christian message of the crucifixion and resurrection of Jesus Christ, a doctrine at the heart of Christianity." *Okrand v. City of Los Angeles*, 207 Cal. App. 3d 566, 579-580, 254 Cal. Rptr. 913, 922 (1989). No California court has allowed the government to maintain a permanent cross display on public land. In *Fox v. City of Los Angeles, supra*, the California Supreme Court ruled that even a temporary, seasonal illumination of City Hall windows in a cross pattern at Christmas and Easter violated the No Preference Clause. *Fox* compels invalidation of the City's towering, permanent Mt. Davidson cross under the state constitution.

In *Okrand, supra*, a state appellate court distinguished *Fox* to allow the temporary display of a small 19th century Menorah, the "Katowitz Menorah," which had been rescued from destruction during the Holocaust, in a rotating, educational exhibit. Critical to that decision were several factors which do not apply to Mt. Davidson: the court held that a menorah conveys a less powerful sectarian message than a Latin cross; the small unlit Katowitz Menorah was displayed with text educating viewers on its artistic creation and rescue during World War II; and, most importantly, the Katowitz Menorah was

exhibited with other objects on temporary display in a museum-like setting.[5] 254 Cal. Rptr. at 915, 921-922.

The Ninth Circuit applied California's No Preference Clause in *Ellis v. City of La Mesa, supra,* to invalidate the government's display of two large crosses in San Diego County public parks, under Article I, Section 4 of the California Constitution. In *Ellis,* the court derived from California precedents a framework for state constitutional analysis that involves consideration of numerous factors: the religious significance of the sectarian display, the size and visibility of the display, the inclusion of other religious symbols, the historical background of the display and the proximity of the display to government buildings or religious facilities.[6] 990 F.2d at 1525. Applying those factors in *Ellis,* the Court ruled that San Diego could not display large solitary hilltop crosses in parks. 990 F.2d at 1520. Applying those factors again in *Carpenter,* the court

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[5] The Ninth Circuit has correctly derived from *Fox* and *Okrand* the principle that a museum exhibit, with a revolving collection, neutralizes the official imprimatur of a religious artifact's sectarian theme, while a permanent, solitary display of a religious symbol in a location which cannot accommodate a diversity of images heightens a message of government endorsement. *Hewitt v. Joyner,* 940 F.2d 1561 (9th Cir. 1991) (county government violated the No Preference Clause by accepting a gift of parkland which contained biblical statues).

[6] California law does *not* include judicial assessment of the perceptions of "ordinary people" (Pet. at 6), and no court has sanctioned the pollsters' "person-on-the-street" approach to constitutional law the City urged in this case (Pet. at 4 n. 2.). *Cf. Capital Square Review Board v. Pinette,* 132 L.Ed.2d 650, 672-673 (1995) (O'Connor, J., concurring) (under federal constitutional law, reasonable observer is hypothetical informed observer, not casual ignorant passerby).

ruled that San Francisco could not continue to display an enormous cross in Mt. Davidson park. App. 8-13.

The City's accusation that the Ninth Circuit's decision in this case established a *per se* prohibition against religious imagery is nonsense. The opinion carefully analyzes the factual record under each of the *Ellis* factors.[7] That analysis shows that the City's display of the Mt. Davidson Cross parallels or exceeds the official religious preference condemned in every state and federal precedent. On this petition, the City simply quarrels with the Ninth Circuit's characterization of a few details in that record. These quibbles do not create a federal question and do not furnish a basis for certiorari. Even if the lower court were wrong, its decision would not represent, as the City charges, an intrusion into the sovereignty of the state of California.

In fact, the court was correct. The City's Cross does not possess unique historical, cultural, or artistic significance. A history professor who reviewed the historical records on the Cross testified unequivocally that "the Mt. Davidson Cross was conceived, erected, and maintained as a religious pilgrimage site for Easter Services and as a way to proselytize on behalf of Christianity." ER 245. The history of sectarian dedication ceremonies, Easter sunrise services and ritualistic illumination to commemorate significant Christian holidays demonstrates a remarkable

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[7] The City's accusation that a footnote in *Ellis* foreclosed the Court's ruling in *Carpenter* (Pet. at 11) is equally silly. The *Ellis* footnote noted and described the district court opinion in *Carpenter*. The *Ellis* panel did not prejudge the merits of *Carpenter* without benefit of briefing or record.

fusion of church and state. In the 60-year history of the Cross, the City highlights a single event: President Roosevelt's touching a light switch in Washington to illuminate the Cross during the dedication ceremony for the lights conducted on the eve of Palm Sunday. This electronic equivalent of a ribbon-cutting ceremony for a new municipal structure is neither secular nor significant.

The City also failed to prove that the unadorned concrete cross possesses unusual artistic merit. In a report prepared by a San Francisco architect, which the City introduced below, the professional evaluation of the aesthetics of the Cross is:

> The style of the cross used here is Latin in its form and simple in its design, having no applied or integral ornamentation. . . . To the uninitiated (and perhaps even to the initiated) the simple cross does not bespeak any significant architectural talent. ER 320-321.

Indeed, the City has never displayed the Cross as a work of art. It omits the Mt. Davidson Cross from its official directory of works of art owned by the City. CT 47 at Ex. 2. The Cross has no exhibit signs to identify the artist, title, or date of the work. The City displays the Cross as a worship piece, with the sole inscription "Sunrise Easter Cross – Mt. Davidson – First Service 1923."

Finally, the City's inherently implausible claim that the largest cross in the United States on the city's highest peak is visually obscure is both incorrect and irrelevant. During litigation, the City itself described the Mt. Davidson Cross, several times, as a prominent feature of the urban landscape: "The Cross stands 103 feet and is at

least partially visible from many San Francisco neighborhoods." CT 41 at 3, 50 at 1. Mt. Davidson, in fact, is not remote. It is one of several urban parks maintained in a compact city. The San Francisco residential areas of West Portal and Saint Francis Woods border Mt. Davidson park. ER 355. The Cross towers over homes and stores. ER 282, CT 76. While the neighborhood is not adjacent to City Hall, no principle of state constitutional law authorizes the government to maintain large sectarian displays on public property a few blocks away from its headquarters. California law (like federal law) prohibits the use of a public park for a permanent sectarian display, regardless of where the park is located in relation to local government buildings.

San Francisco's massive "Sunrise Easter Cross" creates the impression that Mt. Davidson park is an outdoor church. Mt. Davidson has become a traditional site for Easter services, Christmas gatherings and weddings. ER 36. However, people of minority faiths in San Francisco, a pluralistic city, do not use Mt. Davidson for their religious celebrations (ER 215-216), because they feel uncomfortable in the shadow of its huge official Cross. The California Constitution's No Preference Clause does not allow the government to use sectarian symbols to make its citizens feel like outsiders. The Ninth Circuit applied settled California constitutional principles in concluding that the City may no longer maintain an enormous cross in Mt. Davidson park.

CONCLUSION

Because the petition raises no federal issues, there is no basis for this Court's review. Accordingly, the petition for writ of certiorari should be denied.

San Francisco, California
February 11, 1997

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